

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALEJANDRO TOMAX,

Plaintiff,

v.

WELLS FARGO HOME MORTGAGE, *et al.*,

Defendants.

Case No. 2:10-CV-00796-KJD-PAL

ORDER

Presently before the Court is Defendant Wells Fargo Bank, N.A.'s Motion to Dismiss (#4). Plaintiff filed a response in opposition (#8) to which Defendant Wells replied (#10).

I. Background

On or about August 15, 2005, Plaintiff entered into a loan for \$285,000.00 secured by a Deed of Trust on property located at 2726 Herron Hills St., Las Vegas, Nevada. Plaintiff stopped making payments on the loan on or about November 1, 2008. A Notice of Default and Election to Sell was filed on February 17, 2009 by MTC Financial, Inc. d/b/a Trustees Corp as agent for beneficiary, Wells. On April 21, 2009, Substitution of Trustee was recorded, substituting MTC Financial as Trustee under the Deed of Trust. Notice of Trustee's Sale was filed on June 2, 2009 setting the sale for June 22, 2009. On June 29, 2009, Federal Home Loan Mortgage Corporation purchased the

1 property at the Trustee's Sale. On July 16, 2009, Assignment of Deed of Trust was recorded which
2 transferred all beneficial interest under the Deed of Trust from Wells to Federal Home Loan
3 Mortgage Corporation.

4 On April 20, 2010, ten months after the Trustee's Sale, Plaintiff filed the present complaint in
5 Nevada state court alleging that in June 2009, the parties began communicating regarding the
6 possibility of loan modification. Plaintiff alleges that he had sent correspondence and documentation
7 to the loss mitigation department and representatives of Wells. Plaintiff asserts that Wells told him
8 that the loan would be modified and the property would not be foreclosed on. His complaint asserted
9 the following causes of action: (1) promissory estoppel; (2) wrongful foreclosure/quiet title; (3)
10 tortious misrepresentation; and (4) preliminary/permanent injunction. Defendant Wells has now
11 moved to dismiss Plaintiff's complaint.

12 II. Standard for a Motion to Dismiss

13 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as
14 true and construed in a light most favorable to the non-moving party." Wyler Summit Partnership v.
15 Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
16 Consequently, there is a strong presumption against dismissing an action for failure to state a claim.
17 See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted).

18 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
19 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937,
20 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the
21 context of a motion to dismiss, means that the plaintiff has pleaded facts which allow "the court to
22 draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

23 The Iqbal evaluation illustrates a two prong analysis. First, the Court identifies "the
24 allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations
25 which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949-51. Second, the
26 Court considers the factual allegations "to determine if they plausibly suggest an entitlement to

1 relief.” Id. at 1951. If the allegations state plausible claims for relief, such claims survive the motion
2 to dismiss. Id. at 1950.

3 III. Analysis

4 A. Promissory Estoppel

5 Plaintiff asserts that because he alleged that Wells made “direct verbal representations” that
6 “foreclosure would not occur and that a modification agreement would be executed between the
7 parties”, he has adequately asserted a claim for promissory estoppel. However, deeds of trust are
8 subject to the statute of frauds in Nevada. See Nev. Rev. Stat. § 111.205. Oral agreements to modify
9 deeds of trust are also subject to the statute of frauds. See 37 C.J.S. Stat. Frauds 95; Powell on Real
10 Property, Section 81.02[2][d](“oral modification of a written agreement to convey an interest in
11 property generally fails”). Courts have recognized that even a forbearance agreement is subject to
12 the statute of frauds. See Secrest v. Sec. Nat’l Mortg. Loan Trust 2002-2, 84 Cal. Rptr. 3d 275, 282-
13 83 (Cal. Ct. App. 2008). Plaintiff has not alleged that any written agreement to modify the terms of
14 the loan or forbear exists. Accordingly, the claim for equitable estoppel is barred by the statute of
15 frauds and must be dismissed.

16 B. Wrongful Foreclosure

17 Generally speaking, a tort action for wrongful foreclosure does exist in Nevada, but only if
18 “no breach of condition or failure of performance existed on the mortgagor’s or trustor’s part which
19 would have authorized the foreclosure or exercise of power of sale.” Collins v. Union Federal Sav.
20 & Loan Ass’n, 662 P.2d 610, 623 (Nev. 1983). Plaintiff does not dispute that he breached the
21 agreement by failing to make payments in accordance with the agreement. Therefore, the Court
22 dismisses this claim.

23 In response to Defendant’s motion to dismiss this claim, Plaintiff asserted violations in the
24 procedure for conducting a trustee’s foreclosure sale in Nevada as set forth in NRS § 107.080 *et seq.*
25 However, Plaintiff’s complaint alleges no irregularities in the foreclosure process as described in
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1 Section 107.080. Therefore, the Court grants Plaintiff leave to amend this claim within ten days of
2 the entry of this order.

3 C. Tortious Misrepresentation

4 Defendant has also moved to dismiss Plaintiff's claim for misrepresentation.
5 Misrepresentation is a form of fraud where a false representation is relied upon in fact. See Pacific
6 Maxon, Inc. v. Wilson, 96 Nev. 867, 871 (Nev. 1980). Fraud has a stricter pleading standard under
7 Rule 9, which requires a party to "state with particularity the circumstances constituting fraud." Fed.
8 R. Civ. P. 9(b). Pleading fraud with particularity requires "an account of the time, place, and specific
9 content of the false representations, as well as the identities of the parties to the misrepresentations."
10 Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007); see also Morris v. Bank of Nev., 886 P.2d
11 454, 456 n.1 (Nev. 1994).

12 Plaintiff's claim for negligent misrepresentation fails because it was not pled with specificity
13 under Rule 9(b). In Barnettler v. Reno Air, Inc., the Nevada Supreme Court adopted the
14 Restatement (Second) of Torts § 552 definition of negligent misrepresentation:

15 One who, in the course of his business, profession or employment, or in
16 any other action in which he has a pecuniary interest, supplies false
17 information for the guidance of others in their business transactions, is
18 subject to liability for pecuniary loss caused to them by their justifiable
reliance upon the information, if he fails to exercise reasonable care or
competence in obtaining or communicating the information.

19 956 P.2d 1382, 1387 (Nev. 1998). Nowhere in the Complaint does Plaintiff allege who made the
20 fraudulent statements, when the statements were made, or where they were made. Moreover,
21 Plaintiff fails to allege the specific content of the fraudulent statements—her allegations only include
22 broad generalizations. Accordingly, the Court dismisses Plaintiff's negligent misrepresentation
23 claims. However, Plaintiff is granted leave to amend these claims with specificity. Failure to do so
24 within ten (10) days of the entry of this order will result in Plaintiff's complaint being dismissed with
25 prejudice.

1 IV. Conclusion

2 Accordingly, IT IS HEREBY ORDERED that Defendant Wells Fargo Bank, N.A.'s Motion
3 to Dismiss (#4) is **GRANTED**;

4 IT IS FURTHER ORDERED that Plaintiff file an amended complaint within ten (10) days of
5 the entry of this order.

6 DATED this 29th day of March 2011.

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10 Kent J. Dawson
United States District Judge
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